

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In re Matter of)

Amendment of the Commission's)
Rules Regarding Installment)
Payment Financing For Personal)
Communications Services (PCS))
Licensees)

WT Docket 97-82

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION

Northern Michigan PCS Consortium L.L.C. ("NMC") and Wireless 2000, Inc. ("Wireless 2000") (jointly "Petitioners") hereby respectfully submit their Petition For Reconsideration of the Commission's *Second Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 97-82 (FCC 97-342, released October 16, 1997) ("*Second R&O*") which altered the broadband PCS C-block payment arrangements and which proposed rules to govern the reauction of surrendered spectrum.^{1/}

I. Interest of Petitioners

NMC was the high bidder for seven C-block Basic Trading Area ("BTA") licenses in three Major Trading Areas ("MTA"): (1) Minneapolis MTA: Ironwood, Michigan; (2) Detroit MTA: Alpena and Sault St. Marie, Michigan; and (3) Milwaukee MTA: Escanaba, Iron Mountain, Houghton and Marquette, Michigan.

Wireless 2000 was the high bidder for three C-block BTA licenses in the New Orleans MTA: Alexandria, Monroe and Lake Charles, Louisiana.

^{1/} The *Second R&O* was published in the Federal Register on October 24, 1997, 62 Fed. Reg. 55375.

As licensees of C-block PCS stations, Petitioners are directly affected by any decision to alter the payment terms for any C-block licensees. Petitioners request that the Commission consider further adjustments to the four options it has offered C-block licensees.

II. Options Adopted in the *Second R&O*

In the *Second R&O* the Commission announced four options for C-block licensees: (1) retain all licenses and resume interest payments on March 31, 1998; (2) disaggregate 15 MHz under specified terms for a reduction in remaining debt obligation by 50%; (3) surrender all licenses and receive complete relief or "Amnesty" from remaining payment obligations; or (4) prepay debt for licenses to be retained in return for a cancellation of debt for licenses to be surrendered, with a credit of 70% for the down payments on surrendered licenses.^{2/}

III. The Need for Additional Relief

The basis for offering options to C-Block licensees to reconstruct their installment payment debt was to ease the financial burden on licensees who fell victim to unforeseeable market forces.^{3/} Auctions both before and after the C-block auction have resulted in widely varying license valuations for comparable market areas. While the current C-block options are helpful, the Commission's goals of promoting economic opportunity and competition in the marketplace would be advanced if certain modifications to the current options were adopted through this reconsideration process. Indeed, for

^{2/} See *Second R&O*, paragraphs 23-75.

^{3/} See *Second R&O*, paragraph 21.

several reasons, modifications to the options appear necessary if the goals of smaller company participation and increased competition in the wireless services marketplace are to be realized.

(a) Uniquely High Per-Pop Prices. Auction price history shows that C-block license prices were an aberration in the course of PCS auctions specifically, and wireless auctions in general. Petitioners request the Commission to take official notice of its own data to compare the average "per pop" prices during all of the Commission's auctions to date. While Petitioners do not have ready access to all such data, it is believed that C-block prices reached unprecedented levels.

(b) Vendors Underestimated Infrastructure Costs. Prominent among the reasons that Petitioners bid to the levels they did in the auction was that their business plans were based upon vendors' estimates of system build-out costs. Having acquired licenses and entered into negotiations with vendors, Wireless 2000 was astounded to learn that equipment acquisition costs are significantly higher than were estimated by the vendors before the auction if effective coverage of markets was desired. Wireless 2000 found that PCS infrastructure costs will average 40% more than projected at the pre-auction stage when systematic planning with vendors was relied upon for the company's business plan. Such a change translates into a radically different cash flow projection, leaving Wireless 2000 with a formidable challenge in its attempt to devise a workable business plan. The experience of NMC in this regard is comparable.

(c) Construction Requirements Too Aggressive in Rural BTAs. The infrastructure cost problem is exacerbated for NMC by the Commission's construction requirement for C-block licensees which appears at Section 24.203(a) of the rules. In the *Second R&O* the Commission did not address NMC's request for general relaxation of the C-block construction coverage requirements of 1/3 of the BTA population within 5 years and 2/3 of the BTA population within 10 years.^{4/} This construction requirement may be appropriate for MTAs where there are large population centers, but it is not suitable for many BTAs where there are only small cities and a widely dispersed population. NMC requests that the FCC modify the C-block construction coverage requirement to match the requirement placed upon 10 MHz D, E and F-block PCS licensees who are likewise licensed for BTAs. This would require construction for 1/4 of the BTA population or a showing of "substantial service" within 5 years, with no additional showing within 10 years.

If the current construction requirements are allowed to stand NMC would be obligated to spend an unreasonably large amount of money to meet the build-out requirements. NMC could install 60 tower sites in its seven BTAs, at a cost of approximately \$7,372,613 or \$96 per covered pop, and in the process cover every town or village with a population of at least 500. Still, only 21% of the population of the seven BTAs would be served by the 60 sites. To meet the 67% coverage mandate, another \$16,583,611 would be expended according to current estimates. In actuality, the cost for the incremental build-out would be even higher if one considers the very low population density (*i.e.*, less than 15 persons per square mile) of the BTAs and remoteness of many needed sites from established facilities. The incremental costs to meet the 67%

^{4/} See, Comments of Holland Wireless, L.L.C., *et. al.*, filed June 23, 1997, at pp. 6-7.

standard are not balanced by meaningful increases in the number of customers which could be served. To incur such costs would render the financial projections wholly unacceptable to otherwise interested investors and lending institutions.

(d) Commercial Lenders Want Security Interests in Licenses.

Small businesses do not have access to capital in the same manner as their larger competitors. Relatively few C-block licensees are publicly held corporations, and Petitioners are among those who are not. To build-out PCS systems, Petitioners must rely upon borrowed money. However, since much of the investment by Petitioners involves the licenses, the issue of subordinated security interests in licenses arises whenever lenders are approached about financing. Unfortunately, Commission rules do not allow commercial lenders to acquire security interests in radio licenses, meaning that the loans, if offered at all, are on less than ideal terms.

IV. Modification of Options, and Additional Relief Requested

Each problem faced by C-block licensees threatens the viability their businesses; together the problems appear overwhelming. The Commission's assistance through modification of the available options and through additional forms of relief are respectfully but urgently requested.

(a) Change of Debt Pay-off Terms. Resumption of interest payments as scheduled on March 31, 1998 is too soon to allow C-block licensees to adjust to the problems encountered to date. If the current suspension of interest payments were extended for two more years, C-block licensees would have an opportunity to construct initial systems

and have a cash flow to resume interest payments.

NMC believes that the beginning of principal repayment in year 6 is feasible if the time period for such repayment is 15 years, not 4 years. The cash flow projections are not sufficient to support principal repayment over such a brief period as four years.

Wireless 2000 as well as NMC have made all payments to date in a timely manner. Petitioners intend to meet all future obligations in a timely manner, but both are seriously concerned about their ability to do so if the payment terms are not restructured.

(b) Modify Disaggregation Conditions to Allow for Participation in the Reauction.

In order to standardize the options available to all C-block licensees, Petitioners request the Commission to modify the current disaggregation option to allow those who disaggregate spectrum to bid on it at reauction. In the *Second R&O*, the Commission allows a licensee to elect disaggregation of 15 MHz of the 30 MHz won at auction, and have 50% of the debt for that license forgiven. Half of the down payment made to date would be applied to the retained license debt, and the other half would be forfeited. That forfeiture should be considered a penalty paid by the licensee, and there should be no bar on that entity (or its attributable investors) from bidding on the surrendered spectrum at reauction. Given that both the "Amnesty" and "Disaggregation" options relieve a licensee of debt, Petitioners believe there is a considerable inequity in allowing some licensees who give up spectrum a chance to participate in the reauction, but not others. Relief in this area would make disaggregation a more useful alternative as the options are considered. Allowing some auction winners a "clean slate" without similar opportunity to the other licensees favors one set of small business owners over another. The result is patently unfair, and contrary to the intention of Congress that the Commission should encourage

the participation of "designated entities" in new telecommunications services.^{5/}

(c) The "Prepayment" Option Should Allow Payment Based Upon the "Net Present Value" of the Note. Under the "Prepayment" option, C-block licensees may elect to keep certain licenses and surrender others under terms specified by the *Second R&O*. Where licenses are surrendered, a penalty is incurred which equals 30% of the down payments for such licenses. The Commission declined in the *Second R&O* to allow prepayment based upon the "net present value" of the notes.^{6/} Petitioners request that the Commission reconsider that decision. If a note is prepaid, the value to the U.S. Treasury is the same, and there is no debt collection risk or possibility of bankruptcy proceedings involving the government on the prepaid licenses. Thus, there is no prejudice to the government, and indeed there are benefits. For licensees, use of a net present value formula would encourage the use of the prepayment option. Prepaid licenses also enhance a licensee's position in obtaining a loan from commercial sources since there is no license debt. Among other things, licensees could agree to grant commercial lenders a first security interest in licenses at such time as the Commission may allow for such an arrangement.

^{5/} A post-auction change in the rules should be accomplished only with comparable treatment of similarly situated parties. Compare *Telephone and Data Systems v. FCC*, 19 F.3d 42 (D.C. Cir., 1994), *Telephone and Data Systems v. FCC*, 19 F.3d 655 (D.C. Cir., 1994) and *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) where the court found that the Commission inadequately had explained its different conclusions when applying the same Commission standards under similar factual situations.

^{6/} See, *Second R&O* at para. 66.

(d) Allow Commercial Lenders to Acquire a Security Interest in Licenses. NMC is negotiating terms of a loan with a particular lender, and has learned that if the lender could be granted even a subordinated security interest in NMC's licenses, the lender would be more willing to offer the loan, and that the terms would be improved. While the licenses subject to government debt have no significant residual value at this time, that situation is expected to change as PCS systems are operated over the years. Petitioners recognize that the Commission has reviewed this question previously, but request that the benefit of a changed policy as to security interests be considered again at this time.

(e) Standardize Interest Rate for C-block Licensees at 6.5%.

Petitioners request that the Commission equalize the interest rate in notes signed by all participants in the same auction.^{7/} The proposition that some C-Block licensees would have lower interest rates due to a delay in grant of their licenses is inequitable to others, such as Petitioners, whose qualifications to hold licenses were unchallenged and who received license grants with the first group of applications processed by the Commission. Petitioners consider the interest rate to be an important aspect of business planning associated with the options presented by the Commission, and request that the rate question be decided concurrently with the reconsideration of the *Second R&O*. Since one of the goals of the Commission is to "promote economic opportunity and economic competition in the marketplace" for auction participants^{8/} then it is essential that when

^{7/} Comment on a requested standardization of the interest rate at 6.5% was invited by a Commission Public Notice dated June 2, 1997 (DA 97-1152) in response to a rule waiver request filed by Omnipoint Corporation and informal requests by other C-block licensees. No action was taken by the Commission following the receipt of comments and reply comments in this matter.

^{8/} See 47 U.S.C. § 309(j)(3)(A), (B).

C-block licensees exercise their choice of restructuring options they have a level playing field with respect to their treatment by the FCC in all other respects.

(f) Relax the C-Block Construction Requirement to Conform with Construction Requirements for D, E and F-Block PCS Licensees. NMC's analysis of the burdens associated with the current build-out requirement for C-block licensees was summarized in Section III(c) of this petition. In essence, the BTAs are different from the MTAs because of population distribution characteristics. Since the C, D, E and F-block licenses all were granted on a BTA basis, the less burdensome standard pertaining to the D, E and F-block licensees should apply to the C-block as well.^{9/} Section 24.203 of the Commission's rules should be amended accordingly.

The Commission previously has been willing to recognize and correct a situation where the economic burden imposed by a rule on a licensee would be financially devastating. An example is where the Commission stayed its call blocking and unblocking requirements in response to waiver petitions from several small and rural local exchange carriers who, faced with a need to purchase expensive software to perform Caller ID functions, claimed that providing blocking and unblocking was economically infeasible.^{10/} In this instance, C-block licensees are similarly situated small businesses. Consistent with previous actions, the Commission should reconsider and revise a rule where the impact would be harmful to broader, more important goals.

^{9/} To the extent that some C-block licensees elect the "Disaggregation" option, their remaining spectrum and license areas will be remarkably similar to that of the D, E and F-block licensees.


^{10/} *Order and Fourth Notice of Proposed Rulemaking*, 10 FCC Rcd 13786, 13806 (1995).

(g) The Option Election Date Should be Postponed. The *Second R&O* specified January 15, 1998 as the deadline for election of options offered to the C-block licensees. Petitioners request that the Commission extend that deadline to a date which is 60 days after the release of an order on reconsideration of the *Second R&O*. Naturally, any change to the options occasioned by the reconsideration process will require careful consideration by C-block licensees. Even if no significant change to the options is adopted, Petitioners submit that the current deadline is impractical given other year-end business obligations such as budgetary planning and approval processes among company owners. The year-end holidays also complicate meeting schedules for decision-making. For these reasons, Petitioners request additional time to reach their decisions on matters which impact the future viability of their companies.

For all of the foregoing reasons, Petitioners respectfully request the Commission to reconsider its *Second R&O* consistent with the comments provided herein.

Respectfully submitted,

NORTHERN MICHIGAN PCS CONSORTIUM L.L.C.
and
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Date: November 24, 1997

CERTIFICATE OF SERVICE

I, Loren B. Costantino, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 24th day of November, 1997, sent by hand-delivery, copies of the foregoing PETITION FOR RECONSIDERATION to the following:

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